

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Respondent,*

*v.*

WESLEY WAYNE HAMILTON,  
*Petitioner.*

No. 2 CA-CR 2020-0016-PR  
Filed June 24, 2020

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).*

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Petition for Review from the Superior Court in Cochise County  
No. S0200CR201700556  
The Honorable James L. Conlogue, Judge

**REVIEW GRANTED; RELIEF DENIED**

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Wesley W. Hamilton, Tucson  
*In Propria Persona*

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

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V Á S Q U E Z, Chief Judge:

¶1 Wesley Hamilton seeks review of the trial court’s order dismissing his petition for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P.<sup>1</sup> We will not disturb that order unless the court has abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Hamilton has not met his burden of establishing such abuse here.

¶2 Pursuant to a plea agreement in cause number CR200000301, Hamilton was convicted of attempted sexual abuse of a minor under fifteen years of age and indecent exposure to a minor under fifteen years of age. In December 2004, the trial court sentenced him to consecutive prison terms totaling four years.<sup>2</sup>

¶3 Pursuant to a plea agreement in cause number CR201700556, Hamilton was convicted of failing to register as a sex offender. In October 2017, the trial court suspended the imposition of sentence and placed Hamilton on supervised probation for four years. The following month, the state filed a petition to revoke Hamilton’s probation, and he later admitted to having violated his probation conditions. The court thereafter reinstated supervised probation. The next month, however, the state filed another petition to revoke probation, and Hamilton again admitted to

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<sup>1</sup> Effective January 1, 2020, our supreme court amended the post-conviction relief rules. Ariz. Sup. Ct. Order R-19-0012 (Aug. 29, 2019). The amendments apply to all cases pending on the effective date unless a court determines that “applying the rule or amendment would be infeasible or work an injustice.” *Id.* Because it is neither infeasible nor works an injustice here, we cite to and apply the current version of the rules.

<sup>2</sup>Hamilton was originally convicted and sentenced in CR200000301 in December 2002, but he sought and was granted post-conviction relief, resulting in the trial court vacating his December 2002 sentence and reinstating the indictment.

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having violated a condition of his probation. In June 2018, the court sentenced Hamilton to a presumptive, 2.5-year term of imprisonment.

¶4 In August 2018, Hamilton filed a notice of post-conviction relief, and appointed counsel subsequently filed a notice stating she had reviewed the record but had been unable to find any claims to raise. In his pro se petition for post-conviction relief, Hamilton argued the requirement that he register as a sex offender “was never agreed to nor ordered by the court in case CR200000301, rendering an illegal plea and sentencing in CR201700556.”

¶5 After reviewing the state’s response and Hamilton’s reply, the trial court summarily dismissed the petition. The court explained that A.R.S. § 13-3821(A)(3) “mandates” registration for those convicted of certain offenses, including attempted sexual assault of a minor. It further observed that Hamilton had been convicted of that offense in CR200000301, making the “registration requirement . . . automatic and not contingent on either a reference in the previous plea agreement or an order at the time of sentencing in the previous case.”<sup>3</sup> The court additionally noted that Hamilton’s notice of post-conviction relief was untimely as to his October 2017 conviction, and, while timely as to the revocation proceeding, Hamilton raised no issues regarding that proceeding. Hamilton filed a motion for rehearing, which the court also denied.

¶6 On review, Hamilton first challenges his underlying conviction in CR200000301, arguing that the indictment in that case was

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<sup>3</sup>In its order, pursuant to Rule 111(c)(1)(C), Ariz. R. Sup. Ct., the trial court relied on *State v. Peralta*, No. 1 CA-CR 15-0663 (Ariz. App. June 8, 2017) (mem. decision), in which this court concluded that summary dismissal of the defendant’s petition for post-conviction relief was appropriate. The defendant argued that “his 1986 conviction for attempted sexual conduct with a minor did not require registration” because “the plea agreement did not require registration.” *Id.* ¶ 5. This court explained that “because attempted sexual conduct with a minor is an offense for which registration is statutorily mandated, the absence of a reference to sex offender registration in the plea agreement and the failure to expressly order registration at the 1986 sentencing is immaterial.” *Id.* ¶ 6.

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“insufficient as a matter of law.”<sup>4</sup> But, as Hamilton seems to acknowledge, he did not raise this argument until his reply to the state’s response. The argument is therefore waived. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 6-7 (App. 2009). Moreover, to challenge his conviction in CR200000301, Hamilton needed to initiate a proceeding for post-conviction relief under that cause number. *See* Ariz. R. Crim. P. 33.3(a) (post-conviction proceeding part of original criminal action), 33.4(b)(2) (notice must contain caption of original criminal case to which it pertains).

¶7 Hamilton next argues that the sex offender registration requirement does not apply to him because he was a minor when he committed the offenses in CR200000301. *See* § 13-3821(D) (“The court may require a person who has been adjudicated delinquent for an act that would constitute an offense specified in subsection A or C of this section to register pursuant to this section.”). Again, however, the argument is waived because Hamilton did not raise it until his reply to the state’s response. *See Lopez*, 223 Ariz. 238, ¶¶ 6-7. Even assuming the argument were not waived, however, nothing in the record before us indicates that Hamilton was adjudicated delinquent. Prosecutors have discretion in determining whether to charge a defendant as an adult or a juvenile when the defendant is at least fourteen years old and commits certain offenses. *See* A.R.S. § 13-501(B); *Andrews v. Willrich*, 200 Ariz. 533, ¶¶ 15-16 (App. 2001). Hamilton, who was seventeen years old at the time he committed the offenses in CR200000301, was charged as an adult with a class two felony.

¶8 Hamilton next reasserts his argument that, because sex offender registration was not a term of his plea agreement in CR200000301 and because the trial court never ordered registration at the December 2004 sentencing, his plea agreement and sentence in CR201700556 are invalid.<sup>5</sup> At bottom, however, Hamilton’s argument appears to be a challenge to the validity of his conviction. But he did not seek post-conviction relief after he

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<sup>4</sup>Hamilton seems to be reasserting the same claim raised in his petition for post-conviction relief in CR200000301 for which he was granted relief in December 2004.

<sup>5</sup>Although the trial court did not order Hamilton to register as a sex offender at the December 2004 hearing in CR200000301, it appears that the requirement was discussed during the original December 2002 sentencing, which the court basically adopted as part of the December 2004 sentencing. And Hamilton was apparently aware of the registration requirement, as he filed the necessary paperwork several times, as early as January 2005.

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was initially placed on probation in October 2017. His claim is therefore untimely. *See* Ariz. R. Crim. P. 33.1(a), 33.4(b)(3)(A); *see also* *State v. Herrera*, 121 Ariz. 12, 14 (1978); *cf.* *State v. Falco*, 162 Ariz. 319, 321 (App. 1989) (when used in context of rules governing post-verdict proceedings, term “sentence” includes probation). And, as the trial court noted, although Hamilton’s notice was timely as to the June 2018 probation revocation, Hamilton has asserted no claim related to that proceeding. The court therefore did not abuse its discretion in summarily dismissing Hamilton’s petition. *See* *Roseberry*, 237 Ariz. 507, ¶ 7.

¶9 Moreover, even assuming Hamilton’s argument were timely, it would be waived. Because Hamilton pled guilty to failing to register as a sex offender, he waived all non-jurisdictional defects, including deprivations of constitutional rights. *See* *State v. Flores*, 218 Ariz. 407, ¶ 6 (App. 2008). Indeed, his plea agreement provided that Hamilton “waives and gives up any and all motions, defense objections, or requests . . . to the Court’s entry of judgment against him and imposition of a sentence upon him consistent with the Agreement.”

¶10 Accordingly, although we grant the petition for review, we deny relief.